NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CHURCH OF SCIENTOLOGY OF CALIFORNIA, Plaintiff and Appellant; MARY SUE HUBBARD, Intervener and Appellant, v. GERALD ARMSTRONG, Defendant and Respondent.	B005912 (Super.Ct.No. C 420153)

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul C. Breckenridge, Jr., Judge. Dismissed.

Rabinowitz, Boudin, Standard, Krinsky & Lieberman, Overland, Berke, Wesley, Gits, Randolph & Levanas, Peterson & Brynan, Eric M. Lieberman, Donald Randolph, Michael Lee Hertzberg and John G. Peterson for Appellant and Intervener.

Contos & Bunch, Flynn & Joyce, Bruce M. Bunch, Julia Dragojevic and Michael J. Flynn for Defendant.

The Church of Scientology of California (Church) sued former Church staff member Gerald Armstrong, alleging, inter alia, that he converted to his own use original confidential archive materials and photocopies of such materials, and disseminated the same to unauthorized persons, thereby breaching his fiduciary duty to the Church, which sought return of the documents, injunctive relief against further dissemination of the materials or information contained therein, imposition of a constructive trust over the property and any profits Armstrong might realize from his use of the materials, as well as damages. Mary Sue Hubbard, wife of Church founder L. Ron Hubbard, intervened in the action, alleging causes of action for conversion, invasion of privacy, possession of personal property [sic], and declaratory and injunctive relief. Armstrong cross-complained for damages for fraud, intentional infliction of emotional distress, libel, breach of contract, and tortious interference with contract. The cross-complaint was severed from the complaint and has not yet been tried.

Following a lengthy trial on the complaint, the trial court determined, as reflected in its statement of decision, that the Church had "made out a prima facie case of conversion (as bailee of the materials), breach of

fiduciary duty, and breach of confidence (as the former employer who provided confidential materials to its then employee for certain specific purposes, which the employee later used for other purposes to plaintiff's detriment)." The court also found that Mary Sue Hubbard had "made out a prima facie case of conversion and invasion of privacy (misuse by a person of private matters entrusted to him for certain specific purposes only)."

The court found that Armstrong "did not unreasonably intrude upon Mrs. Hubbard's privacy under the circumstances", and that his conduct with respect to both plaintiffs was justified, in that he took and kept the documents because he believed that his and his wife's physical and mental well-being were threatened by the Church, and that he could only protect them by keeping the documents as evidence supportive of his statements about the Church, and by "going public" so as to minimize the risk that L. Ron Hubbard, the Church, or any of their agents would do him physical harm.

With respect to the materials taken by Armstrong, the court found "that neither plaintiff has clean hands, and that at least as of this time [neither is] entitled to the immediate return of any document or object[] presently retained by the court clerk."

Judgment was entered in Armstrong's favor on August 10, 1984.[1/] With respect to the documents the court made the following orders:

> "(a) All documents and objects received in evidence or marked for identification during trial, unless specifically ordered sealed, are matters of public record and shall be available for public inspection or use to the same extent that any such exhibit would be available in any other lawsuit;
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> "(b) Those exhibits specifically ordered sealed are as follows: Exhibits in Evidence Nos. 500-40; JJJ; KKK; LLL; MMM; NNN; OOO; PPP; QQQ; RRR; and 500-QQQQ. Exhibits for identification only Nos. JJJJ; Series 500-DDDD, EEEE, FFFF, GGGG, HHHH, IIII, NNNN-1, OOOO, ZZZZ, CCCCC, GGGGG, IIIII, KKKKK, LLLLL, OOOOO, PPPPP, QQQQQ, BBBBBB, OOOOOO, BBBBBBB;
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> "(c) The 'inventory list and description' of materials turned over by counsel for Defendant Gerald Armstrong to the Court shall not be considered or deemed to be confidential, private or under seal;
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> "(d) Defendant Gerald Armstrong and his counsel are free to speak or communicate upon any of Defendant Gerald Armstrong's recollections of his life as a Scientologist or upon the contents of any exhibit received in evidence or marked for identification and not specifically ordered sealed;

1/ The judgment is not included in the present record. We take judicial notice of the record in Roes 1-200 v. Superior Court (B010793, B010402, B012860) which does include a copy of the judgment entered herein.

"(e) As to all documents and other materials held under seal by the Clerk, Defendant Gerald Armstrong and his counsel shall remain subject to the same injunctions as presently exist, at least until the conclusion of the proceedings on the Cross-Complaint of Defendant Gerald Armstrong.

"(f) In any other legal proceedings in which defense counsel, Contos & Bunch and Michael J. Flynn, or any of them, is of record, such counsel shall have the right to discuss exhibits under seal, or their contents, if such is reasonably necessary and incidental to the proper representation of his or her client;

"(g) If any court of competent jurisdiction orders Defendant Gerald Armstrong or his counsel to testify concerning the fact of any such exhibit, document, object, or its contents, such testimony shall be given, and no violation of this judgment will occur;

"(h) Defendant Gerald Armstrong and his counsel may discuss the contents of any documents under seal or . . . any matters . . . which this Court has found to be privileged as between the parties hereto, with any duly constituted governmental law enforcement agency or submit any exhibits or declarations thereto concerning such document or materials, without violating this judgment;

"(i) All other documents or objects presently in the possession of the Clerk of the Court and not marked as court exhibits, shall be retained by the Clerk subject to the same orders as are presently in effect as to sealing and inspection; until such time as trial court proceedings are concluded as to the severed Cross-Complaint of Defendant Gerald Armstrong.

"(j) For the purposes of this Judgment,

> conclusion will occur when any motion for new trial has been denied, or the time within [which] such a motion must be brought has expired without such a motion being made. At that time, all documents neither received in evidence, nor marked for identification only, shall be released by the Clerk to Plaintiff's [representatives]. Notwithstanding this Order, the parties may at any time, by written stipulation filed with the Clerk, obtain release of any or all such unused material;
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> "(k) This Court will retain jurisdiction to enforce, modify, alter or terminate any injunction included within this Judgment."

Plaintiffs appeal, contending: (1) the defenses found by the trial court do not apply to their causes of action, (2) the defenses would not in any event defeat plaintiffs' claims for injunctive relief, (3) the trial court erred in applying the defense of unclean hands, (4) the court erred in unsealing certain of the documentary exhibits, and (5) the court erred in admitting "vast amounts" of hearsay and irrelevant evidence, resulting in a miscarriage of justice.

Armstrong contends the judgment is in all respects proper.

There is a threshold question, not raised by the parties, whether the judgment entered on the complaint is an

appealable judgment. "As our Supreme Court stated in Collins v. Corse (1936) 8 Cal.2d 123, 124 . . .: 'If it is not an appealable order, it is the duty of this court on its own motion to dismiss the appeal.'" (DeGrandchamp v. Texaco, Inc. (1979) 100 Cal.App.3d 424, 430.)

As a general rule, "an appeal will be dismissed where a purported final judgment is rendered in a complaint without adjudicating the issues raised by a cross-complaint." (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 56, p. 78.) "The authorities clearly hold that an action in which cross-complaint or counterclaim is also filed is not one wherein a multiplicity of final judgments may result. [Citations.]" (Clovis Ready Mix Co. v. Aetna Freight Lines (1972) 25 Cal.App.3d 276, 281.)

This is so because "[t]here can be but one final judgment in an action, and that is one which in effect ends the suit in the court in which it was entered, and finally determines the rights of the parties in relation to the matter in controversy. [Citations.]" (Stockton etc. Works v. Ins. Co. (1893) 98 Cal. 557, 577; DeGrandchamp v. Texaco, Inc., supra, 100 Cal.App.3d at p. 431.)

In DeGrandchamp, the court recognized that "[t]here are exceptions to this rule, and there is at least one acceptable device for avoiding it under certain circumstances." (DeGrandchamp v. Texaco, Inc., supra, 100 Cal.App.3d at p.431.) The only recognized exception relevant to our case is that discussed in Schonfeld v. City of Vallejo (1975) 50 Cal.App.3d 401, where the court considered the effect of severance pursuant to Code of Civil Procedure section, 1048[2/] stating, at page 417: "Our research has disclosed no case that considers the conflict between the one final judgment rule and the severance

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[2/] Section 1048 provides, in part: "(b) The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this state or the United States."

The Legislative Committee Comment--Assembly to section 1048 reads, in part: "Section 1048 does not deal with the authority of a court to enter a separate final judgment on fewer than all the causes of action or issues involved in an action or trial. See Code of Civil Procedure sections 578-579; 3 Cal.Jur.2d Appeal and Error § 40; California Civil Appellate Practice §§ 5.4, 5.15-5.26 (Cal.Cont.Ed.Bar 1966); 3 B. Witkin, California Procedure Appeal §§ 10-14 (1954). This question is determined primarily by case law, and Section 1048 leaves the question to case law development."

statute, Code of Civil Procedure section 1048. An eminent authority notes that '. . . in complicated cases the one final judgment rule proves to be a delusion, and appeals from separate final judgments in a single action continue to present the most difficult problems in the field of appellate procedure' (6 Witkin, Cal. Procedure, Appeal, § 37, pp. 4051 and 4052).[3/] And we have indicated that even though a cause of action is severed and tried separately, pursuant to Code of Civil Procedure section 1048, a separate judgment is not necessarily the result (National Electric Supply Co. v. Mount Diablo Unified School Dist., 187 Cal.App.2d 418, 421-422 . . . .)."

The Schonfeld court conceded that, "given the workload of the appellate courts of this state, it would be an unnecessary and wasteful burden for all concerned to rigidly adhere to the one final judgment rule. This court has previously indicated that pursuant to federal practice, separate appealable judgments may be rendered on counts that present separate claims for relief (Fed. Rules Civ. Proc., rule 54(b); see Reeves v. Beardall, 316 U.S. 283 [86 L.Ed.

3/ Now see 9 Witkin, California Procedure (3d ed. 1985) Appeal, section 44, pages 67- 68.

1478, 62 S.Ct. 1085]; Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 [100 L.Ed. 1297, 76 S.Ct. 895]; Cold Metal Process Co. v. United Co., 351 U.S. 445 [100 L.Ed. 1311, 76 S.Ct. 904]; Wilson v. Wilson, 96 Cal.App.2d 589, 596 . . . . At the time of our decision in Wilson, no California court had recognized such an exception . . . . The test is whether the circumstances here presented are so unusual that postponement of the appeal until the final judgment on Schonfeld's fourth cause of action would cause so serious a hardship and inconvenience as to require us to augment the number of existing exceptions (U.S. Financial v. Sullivan, 37 Cal.App.3d 5, 11-12 . . .; Western Electroplating Co. v. Henness, 172 Cal.App.2d 278, 283 . . .; see Gombos v. Ashe [(1958) 158 Cal.App.2d 517] 523)." (Schonfeld v. City of Vallejo, supra, 50 Cal.App.3d at p. 418; DeGrandchamp v. Texaco, Inc., supra, 100 Cal.App.3d at p. 434.)

In Schonfeld, the court held that a final judgment resulted as to properly severed causes of action, i.e., those that raised issues separate and independent from the cause of action remaining to be tried. (Schonfeld v. City of Vallejo, supra, 50 Cal.App.3d at pp. 418-419.) In DeGrandchamp, on the other hand, the facts could not be brought within this rule, as at least two remaining causes

of action were "wholly dependent" upon the obligation which was the subject of the severed cause of action for declaratory relief upon which judgment had been entered. (DeGrandchamp v. Texaco, Inc., supra, 100 Cal.App.3d at p. 435; Highland Development Co. v. City of Los Angeles (1985) 170 Cal.App.3d 169, 179.)

The present case presents a somewhat different problem, as we are here concerned not with severance of a cause or causes of action, but of the complaint from the cross-complaint. The claims for relief are clearly separate and distinct. However, we cannot say that "the circumstances here presented are so unusual that postponement of the appeal until the final judgment on [the cross-complaint] would cause so serious a hardship and inconvenience as to require us to augment the number of existing exceptions [to the single judgment rule]." (Cf. Schonfeld v. City of Vallejo, supra, 50 Cal.App.3d at p. 418; Armstrong Petroleum Corp. v. Superior Court (1981) 114 Cal.App.3d 732, 737.)

Moreover, the record of the trial on the complaint, and the allegations of the cross-complaint, make it clear that there is considerable overlap of factual matters asserted as justification for Armstrong's taking of the

plaintiffs' documents, and alleged by him as having caused him damage. The trial court acknowledged this overlap when it granted the motion to sever, but apparently felt that resolution of the issues relating to the conversion cause of action might expedite resolution of the remaining issues.

The factual overlap might not preclude our review of the judgment entered herein, were it not for the documents which are inextricably entwined with both complaint and cross-complaint. The primary object of the complaint is repossession of the documents by the plaintiffs. The primary exhibits at trial of Armstrong's cross-complaint will also come from among the documents. The trial court found that they belonged to the plaintiffs, but that the plaintiffs had unclean hands which justified delaying their return until the judgment entered on the cross-complaint is final. At that time, all documents "neither received in evidence, nor marked for identification," are to be released to plaintiff's representatives. Thus the court's order contemplates and calls for retention of the documents until the conclusion of the trial on the cross-complaint, and fails thereafter to finally dispose of the documents entered as exhibits[4/] or marked for identification, including a

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4/ Code of Civil Procedure section 1952.2

(Footnote Continued)

number of sealed documents which are of particular importance to the plaintiff owners.

The upshot is that disposition of a number of documents is left for the trial court's consideration at the close of trial on the cross-complaint, and the present judgment is not a final judgment.

Inasmuch as counsel informed us at oral argument that trial of the cross-complaint is scheduled to commence in January 1987, the interests of judicial economy would best be served by dismissing the present purported appeal and remanding the cause to the trial court for determination and judgment at the conclusion of the trial on the cross-complaint. In accordance with the general rule (9 Witkin, Cal. Procedure, Appeal, § 56, supra), the appeal will be dismissed; the issues raised herein may be considered upon an appeal from the judgment following trial of the cross-complaint, insofar as they are not then moot.

(Footnote 4 Continued)

provides: "[Up]on a judgment becoming final, at the expiration of the appeal period, unless an appeal is pending, the court, on its discretion, and on its own motion by a written order signed by the judge, filed in the action, and an entry thereof made in the register of actions, may order the clerk to return all of the exhibits and depositions introduced or filed in the trial or a civil action or proceeding to the attorneys for the parties introducing or filing the same." (Emphasis added.)

DECISION

The appeal is dismissed. Each party to bear its own costs on this appeal.

NOT TO BE PUBLISHED

DANIELSON, J.

We concur:

KLEIN, P.J.

HERRINGTON, J.*

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* Assigned by the Chairperson of the Judicial Council.